SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/20/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2002-000153

FILED: _____

STATE OF ARIZONA GERALD R GRANT

v.

VIRGINIA MAY HAGERTY RICHARD D COFFINGER

FINANCIAL SERVICES-CCC
PEORIA JUSTICE COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PEORIA JUSTICE COURT

Cit. No. #0071862

Charge: A. D.U.I. EXTREME

DOB: 07/03/32

DOC: 10/24/01

This Court has jurisdiction of this appeal pursuant to Rule 30.1(B) of the Arizona Rules of Criminal Procedure.

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This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial Court, exhibits made of record and the memoranda submitted (both by Appellant). The State (Appellee) has chosen not to file a memorandum.

In her supplemental memorandum, Appellant, Virginia May Hagerty, urges this Court to view the failure of Appellee to file an appellate memorandum as a confession of error. However, this Court may not find a confession of error without resolving the underlying issues raised by Appellant in her appeal. A full and complete record has been presented to this court, and it is this Court's duty to review that record for error, notwithstanding the State's failure to file a memorandum brief in this case.[1] Thus, this Court does not find that Appellee has confessed error.

The charge in this case was Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A). A lengthy evidentiary hearing was held on Appellant's Motion in Limine/ Motion to Suppress the results of the intoxilyzer test. That motion was denied by the trial court. Appellant contends on appeal that the trial court erred. This Court disagrees, and finds that the trial court properly denied Appellant's motion.

Appellant also contends on appeal that insufficient evidence was presented that her blood alcohol content, at the time of driving or within 2 hours, was or exceeded .15 blood alcohol concentration. A.R.S. Section 28-1382(A) provides:

> It is unlawful for a person to drive or be in actual physical control of a vehicle in this State if the person has an alcohol concentration of 0.15 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving, or being in actual physical control of the vehicle.

The undisputed evidence in this case shows that 2-1/2 hours after driving, Appellant's blood alcohol content was measured at 0.199 and 0.196. However, as the prosecutor conceded during oral argument when the case was submitted to the court on the basis of the parties' stipulations[2], the State offered no evidence that related the breath test results back to the time of driving or within two hours of the time of driving. Unfortunately, the record reflects absolutely

[1] State ex rel. McDougall v. Superior Court, 174 Ariz. 450, 820 P.2d 688 (App. 1993).
[2] R.T. of March 22, 2002, at page 11.

no evidence of Appellant's blood alcohol concentration at the time of driving or within 2 hours of driving a vehicle.

The prosecutor argued to the trial judge that the judge could consider the evidence, the field sobriety tests and blood alcohol content, in determining whether Appellant's blood alcohol exceeded .15. However, no evidence of any kind was offered to relate Appellant's poor performances on the field sobriety tests to a specific blood alcohol concentration. Certainly, the trial judge could have taken judicial notice pursuant to Rule 201, Arizona Rules of Evidence, if the trial judge had a familiarity with the principle of retroactive extrapolation. Retroactive extrapolation is a process by which a generally accepted minimal alcohol elimination rate of .015% an hour is used to determine a blood alcohol concentration at a specified time prior to the taking of a breath or blood sample.[3] However, the record does not reflect that the trial judge did take judicial notice of this scientific principle. The trial court is required to inform the parties when the trial judge takes judicial notice, and to provide an opportunity to both parties to be heard as to the "propriety of taking judicial notice and the tenor of the matter noticed."[4]

In the absence of taking judicial notice, there was no evidence from which the trial judge could conclude that Appellant's blood alcohol concentration at the time of driving, or within two hours of driving, exceeded 0.15 blood alcohol concentration. The trial judge erred in finding Appellant guilty.

IT IS THEREFORE ORDERED reversing the trial court's judgment of guilt and sentence imposed as to the charge of Extreme DUI.

IT IS FURTHER ORDERED remanding this matter back to the Peoria Justice Court, with instructions to enter a judgment of Not Guilty and for all further, if any, and future proceedings.

[3] See State v. Claybrook, 193 Ariz. 588, 975 P.2d 1101 (App. 1999).
[4] Rule 201(e), Arizona Rules of Evidence.